Supreme Court, U.S.
FILED
JUN 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1893

In The

Supreme Court of the United States

October Term, 1985

PAUL HENRY EISENBERGER,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

I.

Whether this Court should grant a writ of certiorari to review the denial of a motion to suppress when over 2,700 pounds of marijuana was discovered in the Petitioner's motor vehicle subsequent to the Petitioner's lawful detention pursuant to a traffic violation?

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Paul Henry Eisenberger, was indicted during the January Term, 1984 in the Superior Court of Cobb County, Georgia, for the offense of an improper lane usage because the Petitioner drove over the right lane dividing line without signaling and without ascertaining whether such movement was safe. (R. 4-6). The Petitioner was also indicted for trafficking in marijuana by knowingly possessing over 2,000 pounds of said substance. *Id.*

Prior to trial, the Petitioner filed a motion to suppress the introduction of evidence of all kinds pertaining

to the discovery of the approximately 2,784 pounds of marijuana, claiming that the illegal substance had been discovered pursuant to a pretextual stop by police authorities, and not pursuant to a lawful stop because of a traffic violation. (R. 54-55). After an extensive hearing on the motion to suppress, the trial court denied the Petitioner's request finding that Petitioner had been legitimately stopped by the authorities pursuant to his violation of Georgia law, and that the subsequent police search of the vehicle, under the totality of the circumstances, was lawful. (R. 66-67). Accordingly, no violation of the Petitioner's Fourth Amendment right against unreasonable search and seizure had occurred. *Id.*

Subsequent to the Petitioner's conviction for both indicted offenses, the Petitioner appealed his conviction to the Court of Appeals for the State of Georgia, challenging the sufficiency of the evidence supporting his traffic violation conviction, as well as again raising his claim that the marijuana had been discovered pursuant to a pretextual stop. *Eisenberger v. State,* 177 Ga. App. 673, — S.E.2d — (1986). The Court of Appeals rejected both of these contentions and the Petitioner's application for certiorari from the Georgia Supreme Court was also denied. The Petitioner now seeks a writ of certiorari from this Court to review that decision by the Court of Appeals for the State of Georgia.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court for resolution.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE COURT OF APPEALS FOR THE STATE OF GEORGIA CORRECTLY DETERMINED THAT THE PETITIONER'S MOTION TO SUPPRESS HAD BEEN PROPERLY DENIED AS THE MARIJUANA IN THE PETITIONER'S POSSESSION WAS LAWFULLY DISCOVERED PURSUANT TO A VALID SEARCH INCIDENT TO A LAWFUL TRAFFIC ARREST.

Petitioner contends that his initial stop by Georgia police authorities was merely a pretext to permit the officers to search the Petitioner's vehicle for suspected marijuana. The Petitioner maintains that such a pretextual stop was a violation of his rights under the Fourth Amendment and justified the suppression of the evidence regarding marijuana trafficking at his trial. However, the Respondent notes that both the trial court and the Court of Appeals for the State of Georgia rejected the Petitioner's claims that his initial stop was merely a pretext, and instead found that the Petitioner had in fact committed a traffic violation which lead to the subsequent stop and discovery of the marijuana. Respondent urges this Court to reject the Petitioner's request that this Court make new, factual determinations regarding the motivations of the Georgia police authorities and requests this Court to deny certiorari in the instant case.

As demonstrated at the hearing on the motion to suppress, Georgia Bureau of Investigation (G.B.I.) agents originally began surveillance of the Petitioner, and his motor home with Kentucky license plates, after the Peti-

tioner had met with a known drug smuggler in Gainesville, Florida. (M.H.T. 10, 24). After this meeting with the drug smuggler, the Petitioner then proceeded north through the state of Georgia on Interstate 75. *Id.* at 9. G.B.I. Agent John Lang was summoned to assist in the surveillance of the Petitioner as the Petitioner passed through the city of Atlanta at approximately 1:00 a.m. on January 17, 1984. *Id.* at 9-10. Agent Lang personally observed the Petitioner's motor home and testified that it was "obviously gross (sic) overweight", that the vehicle would sway from side to side in a slow, rolling motion indicating great weight and that it was apparently very difficult to control. *Id.* at 12, 25-26. Agent Lang also personally observed, "the vehicle veer out into the left lane and then back onto the right lane" as it drove north on the interstate. *Id.* at 13. Any stop of the suspicious vehicle, Agent Lang testified, was originally intended to merely identify the driver. *Id.* at 34.

G.B.I. Agent Mark P. Jackson also participated in the surveillance of the Petitioner's vehicle. *Id.* at 59-61. Agent Jackson testified that the vehicle appeared to be heavily weighted, swayed back and forth and appeared to have difficulty staying in the traveling lane of the interstate. *Id.* at 61, 77, 79. According to Agent Jackson, the Petitioner's appearance as a lone traveler in a van, driving late at night at a relatively slow speed and apparently heavily weighted, fit the profile of a drug smuggler. *Id.* at 62, 77. Agent Jackson also personally observed the Petitioner's motor vehicle on a number of occasions swerve from one lane to another, almost as if the driver was under the influence of alcohol. *Id.* at 64.

As the Georgia Bureau of Investigation agents were traveling in unmarked cars, assistance was requested from the Georgia State Highway Patrol in their surveillance of the Petitioner's vehicle. *Id.* at 11, 63, 93. Trooper Marion Rigo and Captain Harper answered that call for assistance in their patrol car and began surveillance of the Petitioner's vehicle. *Id.* at 94-95. Trooper Rigo personally observed the Petitioner's vehicle cross lane dividers "as if he didn't know which lane to go into, because he then changed to the right-hand lane with no turn signal." *Id.* at 95. Trooper Rigo originally had suspected that the driver of the vehicle had been drinking or was going to sleep at the wheel. *Id.* at 97, 98. The Georgia State Patrol trooper also observed the Petitioner's vehicle cut off another vehicle in changing lanes, and observed that the Petitioner used no directional signals at all. *Id.* at 97, 109. At this time, Trooper Rigo testified that the G.B.I. surveillance vehicles were back quite away from the Petitioner's van. *Id.*

After personally observing these violations of Georgia law, the troopers had the Petitioner pull his vehicle to the side of the interstate. *Id.* at 96-97, 98-99. The G.B.I. agents also then pulled to the side of the road. *Id.* at 14, 32-33, 65-66.

The Court of Appeals for the State of Georgia found that there was sufficient evidence to enable a rational trier of fact to find that the Petitioner was in fact guilty of improper lane usage in violation of O.C.G.A. § 40-6-123 beyond a reasonable doubt, and that the stopping of Petitioner's vehicle was justified and not a pretext. *Eisenberger v. State*, 177 Ga. App. at 674.

Subsequent to the Petitioner's stop by the police authorities, the Petitioner's driver's license and registration were examined by the Georgia State Patrol troopers. (M.H.T. 99-101). At this time, both G.B.I. agents Lang and Jackson detected the strong odor of marijuana coming from the Petitioner's vehicle. *Id.* at 16, 39, 70. The Petitioner by this time appeared extremely nervous. *Id.* at 68. The Petitioner then lied to the G.B.I. agents, saying that his family was sleeping inside the van and that he did not want them awakened. *Id.* at 15-17, 39, 67-68, 151. By that time, the Georgia State Patrol troopers had learned that the Petitioner's vehicle was registered to someone other than the Petitioner. *Id.* at 100. The Petitioner then became so belligerent that the agents and officers feared a fight would break out on the shoulder of the interstate, which they considered dangerous given the passing traffic on the interstate. *Id.* at 67-68. Petitioner was then placed in the back of the Georgia State Patrol car. *Id.* at 14, 39, 101-02.

As the Petitioner had stated that his family was still in the van, the G.B.I. agents then entered the Petitioner's vehicle to determine if there were any occupants and to investigate the strong, marijuana smell. *Id.* at 18, 42, 43, 72. At that time, fifty-three bales of marijuana, weighing approximately 2,784 pounds, were discovered in the vehicle and the Petitioner was arrested for a violation of the Georgia Controlled Substance Act. *Id.* at 16, 45-46, 49, 72-73. No other persons were found in the vehicle. *Id.* at 18, 45-46.

The trial court in reviewing these circumstances and the motion to suppress found that the search of the Petitioner's vehicle was justified on the basis of the automobile exception to the warrant requirement. (R. 66). In reviewing this Court's decision in *United States v. Ross*, 456 U.S. 798 (1982), the trial court found that the search of the Petitioner's vehicle, after the legitimate stop of the camper, was permissible. *Id.* The initial stop by the Georgia State Patrol pursuant to a traffic violation had been lawful and proper and a citation had been issued for a violation of O.C.G.A. § 40-6-48, an improper lane usage. *Id.* at 67.

Additionally, in reviewing the totality of the circumstances, pursuant to this Court's decision in *Illinois v. Gates*, 462 U.S. 213 (1983), the trial court found that there was probable cause to search the Petitioner's vehicle. *Id.* The G.B.I. agents had observed the Petitioner meeting with a known smuggler, had observed the heavily loaded vehicle swaying from side to side on the road and had detected the smell of marijuana coming from the van. *Id.* Accordingly, the Petitioner's motion to suppress was denied. *Id.*

On direct appeal, the Court of Appeals concurred in this decision, not only finding that the original stop of the Petitioner was not a pretext, but further holding that the stop of the Petitioner's vehicle was authorized based on the existence of a reasonable and articulable suspicion that the Petitioner's vehicle was being used to transport marijuana. *Eisenberger v. State*, 177 Ga. App. at 674(2). Under *Adams v. Williams*, 407 U.S. 143, 146 (1971), the Court of Appeals for the State of Georgia correctly noted

that, "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.* at 675. Accordingly, the Court of Appeals for the State of Georgia concluded that under all of the circumstances, the trial court was clearly authorized to conclude that the initial stop of the vehicle was not arbitrary or harassing and also concluded that, independent of the traffic violation, there was sufficient reason to stop the Petitioner's vehicle. *Id.*

As both the trial court and the Court of Appeals for the State of Georgia had determined that Petitioner's traffic violation did in fact occur and was not merely a pretext for the police stop, the instant case is readily distinguishable from the case of *State v. Blair,* 691 S.W.2d 259 (Mo. banc 1985), which this Court has granted certiorari to review. *Missouri v. Blair,* — U.S. —, 106 S.Ct. 784 (1986). In *Blair* both the trial court and the Supreme Court of Missouri agreed in the factual determination that Blair's original arrest for a parking violation was pretext to gather evidence regarding an unrelated offense. *State v. Blair,* 691 S.W.2d at 262-63. As previously noted, in the instant case neither the trial court nor the Court of Appeals for the State of Georgia has made such a factual determination, but instead both have found that the original stop of the Petitioner by police authorities was justified by the Petitioner's violation of Georgia law. Additionally, as both of the lower courts have correctly determined, once the Petitioner was lawfully stopped for a violation of Georgia law, the subsequent search of the Peitioner's vehicle was permitted under this Court's de-

cision in *United States v. Ross, supra,* as well as being supported by the reasonable and articulable suspicion by the officers that the Petitioner was in fact trafficking in marijuana.

Accordingly, for all of the above and foregoing reasons, Respondent asserts that the Petitioner has failed to present any substantive issue of federal law which would warrant review by this Court.

———o———

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Court of Appeals of Georgia, as it is manifest that there is no substantial federal question not previously decided by this Court and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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